A review of the opinion in *Hataway* (Pet. Appendix D), shows that the plaintiff there was employed by a construction company (Fruin-Colnon Contracting Company) during construction of an extension and addition to the plant of Procter & Gamble Manufacturing Company. The opinion states: "It was Fruin-Colnon Contracting Company's business to construct the building for the Tide addition on the Procter Gamble plant and it was the latter's business to operate the Tide addition after its erection." Thus, the decision in *Hataway* turned on the finding that the *construction* of the building was not part of the defendant's trade or business as required by K.S.A. 44-503(a).

That is not the factual situation presented in the instant case. Here, the Petitioner alleged that he was injured while engaged in cleaning a crude oil storage tank belonging to Respondent (R. 1, 2). Petitioner admitted by answers to interrogatories that Respondent was engaged in pumping oil from producing wells and storing the oil in tanks until it was delivered to a purchaser as part of its business and that it was necessary in the proper conduct of Respondent's business that the tanks be cleaned of sediment (R. 9, 10). The Kansas rule is that if the work being done is an integral part or a reasonable incident of the trade or business of one person and he undertakes to have it performed for him by another person, the workman employed by the person who contracts to do the work may look to the first person for compensation and in such event, the workman cannot maintain a common law action for damages against the first person.[1]

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1. *McCarty* v. *Great Bend Board of Education*, 195 Kan. 310, 403 P. 2d 956 (1965); *Whitaker* v. *Douglas*, 179 Kan. 64, 292 P. 2d 688 (1956); *Coble* v. *Williams*, 177 Kan. 743, 282 P. 2d 425 (1955); *Bright* v. *Bragg*, 175 Kan. 404, 264 P. 2d 494 (1953), and cases collected therein at p. 410.

In *Hataway* the court placed emphasis on the fact that the work being done was construction work preliminary to the operation of the plant by the defendant after its erection. Here, the Petitioner alleged that Respondent maintained and serviced batteries of crude oil storage tanks including the particular tank alleged to have caused injury to Petitioner (R. 1). As the opinion of the lower court noted regarding the instant case "it is admitted that the cleaning of the storage tanks was a necessary and continuing function of defendant's business * * *". The basic factual distinction was recognized in the *Hataway* opinion where the Kansas court cited with approval *Lehman* v. *Grace Oil Co.*, 151 Kan. 145, 154, 98 P. 2d 430 (1940), quoting the following from *Horrell et al.* v. *Gulf & Valley, etc., Inc.*, 15 La. App. 603, 103 So. 709 (1930):

> "'. . . A manufacturing concern upon organization, may contract with an independent contractor for the erection of its factory building without retaining liability under the Compensation Act to employees of the independent contractor who undertakes the construction. It is no part of the trade, business, or occupation of the manufacturing concern to erect its factory building. Its business is to operate it after its erection.'"

The next paragraph of the *Horrell* opinion quoted in *Lehman* v. *Grace Oil Co., supra,* at 154, is the part applicable to the instant case where admittedly the Respondent had in operation and was using at all times in its trade or business the crude oil storage tanks in question:

> "'On the other hand, it is clear that, after the factory is completed and is in operation, the principal may not employ an independent contractor to undertake any part of the business of operating the factory and thus escape liability in compensation to the employees actually engaged in carrying out the work undertaken by the independent contractor. For instance, if defendant here had employed Horrell to fur-

nish the necessary labor to operate the boilers, it is quite evident that Horrell's employees would, under the provisions of section 6 of the act, be entitled to look to defendant for compensation in the event of injury. We thus see that, if the original construction work is not a part of the business of the principal, that work may be contracted away, whereas the operation of the factory after construction is completed, being a part of the business of the principal, may not be so contracted away without the retention of compensation liability."

The distinction between *Hataway* and the instant case lies in the statutory limitation, K.S.A. 44-503(a), that the work undertaken must be part of the principal's trade or business. The Kansas Court held that the erection of the building was not a part of Procter & Gamble's trade or business, but this Petitioner has admitted that the work in which he was engaged at the time of his injury was part of Respondent's business (R. 9, 10).

*Henderson* v. *Sutton's Food City,* 191 Kan. 145, 379 P. 2d 300 (1963), cited by Petitioner, is distinguishable from the instant case in that the accident there occurred while Henderson was en route to Sutton's place of business and did not occur on, in or about premises on which Sutton had undertaken to execute work or which were otherwise under his control or management.

K.S.A. 44-503(d) states:

"(d) This section shall not apply to any case where the accident occurred elsewhere than on, in or about the premises on which the principal has undertaken to execute work or which are otherwise under his control or management, or on, in or about the execution of such work under his control or management."

K.S.A. 44-508(k) provides:

"(k) The words 'arising out of and in the course of employment' as used in this act shall not be con-

strued to include injuries to the employee occurring while he is on his way to assume the duties of his employment or after leaving such duties, the proximate cause of which injury is not the employer's negligence."

In the instant case the Petitioner alleged that the injury occurred on premises where Respondent was conducting and maintaining oil pumping operations and that the crude oil storage tanks in question were "solely and exclusively within the possession and control of defendant" (R. 1, 3).

Although Petitioner states that *Hataway* has changed the Kansas law, a perusal of the opinion (Pet. Appendix D) shows that it does nothing more than decide the question presented by the factual situation of that particular case. No previous Kansas case is purported to be overruled or modified. The members of the Supreme Court of Kansas are not so inarticulate that they are unable to adequately express a change in basic rules of law by use of such a common term as "overruled". The decisions relied upon by Respondent and cited to the United States Court of Appeals for the Tenth Circuit remain the law of Kansas.[2]

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2. *Durnil* v. *Grant*, 187 Kan. 327, 356 P. 2d 872 (1960); *Whitaker* v. *Douglas*, 179 Kan. 64, 292 P. 2d 688 (1956); *Coble* v. *Williams*, 177 Kan. 743, 282 P. 2d 425 (1955); *Bright* v. *Bragg*, 175 Kan. 404, 264 P. 2d 494 (1953); *Primm* v. *Kansas Power & Light Co.*, 173 Kan. 443, 249 P. 2d 647 (1952); *Sheahan* v. *Kansas Power & Light Co.*, 172 Kan. 399, 241 P. 2d 515 (1952); *Lessley* v. *Kansas Power & Light Co.*, 171 Kan. 197, 231 P. 2d 239 (1951); *Swift* v. *Kelso Feed Co.*, 161 Kan. 383, 168 P. 2d 512 (1946); *Hoffman* v. *Cudahy Packing Co.*, 161 Kan. 345, 167 P. 2d 613 (1946); *Bailey* v. *Mosby Hotel Co.*, 160 Kan. 258, 160 P. 2d 701 (1945); *Schroeder* v. *American Nat'l Bank*, 154 Kan. 721, 121 P. 2d 186 (1942); *Johnson* v. *Voss*, 152 Kan. 586, 106 P. 2d 648 (1940); *Raynes* v. *Riss & Co.*, 152 Kan. 383, 103 P. 2d 818 (1940); *Wells* v. *Eagle-Picher M. & S. Co.*, 148 Kan. 794, 85 P. 2d 22 (1938); *Williams* v. *Cities Service Gas Co.*, 139 Kan. 166, 30 P. 2d 97 (1934); and *Purkable* v. *Greenland Oil Co.*, 122 Kan. 720, 253 Pac. 219 (1927).

## CONCLUSION

Petitioner has not shown any special or important reason for granting a review on writ of certiorari. The legal principle involved extends no further than the facts of this particular case as reflected by the record. There is nothing presented to this Court which was not fully considered by the United States Court of Appeals for the Tenth Circuit before its final ruling. The issue involves nothing more than an interpretation of a particular section of the Kansas Workmen's Compensation Act in light of numerous decisions of the state court, and the decision of the Court of Appeals was in accordance with the applicable state law.

Respondent respectfully requests that the petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit be denied.

Respectfully submitted,

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